



ETNO POSITION PAPER

European Media Freedom Act



Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act)

ETNO represents the telecommunications network operators in Europe. In addition to being electronic communications network and services providers, our members are involved throughout the audiovisual media supply chain, including as audiovisual media platforms, providers of TV and VOD services, content producers, providers of user interfaces and devices, and advertisers and sellers of advertising space to third parties.

We strongly welcome the initiative of the European Commission in adopting the proposal for a European Media Freedom Act (EMFA), as a free and open media is a fundamental part of our democracy. Furthermore, as the media and entertainment landscape continues to evolve, it is important that consumers' possibility to choose from a wide range of media options is protected.

We wish to highlight, however, a limited number of issues in the proposed EMFA, namely on the content of media service providers on very-large online platforms (VLOPs); the right to customisation of the media offer; and, state-owned enterprises and the implication for state advertising rules, which we consider deserving specific attention in the ensuing legislative debate.

Content of media service providers on very-large online platforms (Article 17)

As telecoms network operators, active in the audiovisual sphere, our members are often active in providing content (as producers, distributors etc.). Article 17 is concerning, as it introduces the possibility for VLOPs to potentially take arbitrary or problematic decisions over the access to such content. The conditions for the declaration under Article 17 (1) should be proportionate and sufficiently transparent.

We consider it important that the **FRAND conditions apply** (fair, reasonable and non-discriminatory) between the VLOP and a media service provider, with the media service provider being considered the 'business user' of a 'video-sharing platform service' (core platform service) under the Digital Markets Act (DMA).

Right to customisation of the media offer (Article 19)

Article 19(1) introduces a new right for users to customise media offers on devices and interfaces such as connected TVs, to ensure that users can customise, according to their interests or preferences, the default settings of any device or user interface controlling or managing the access to and use of audiovisual media services. This right is accompanied, in para. 2 of this Article, by an obligation on manufacturers and developers to ensure that they include a functionality which enables users to change the default settings controlling or managing the access to, and use of, the audiovisual media services offered. These new rights could potentially impact the television itself, the TV set-top box and the remote control.

The proposed right of customization shows **no direct or indirect causal link to** this Draft Regulation's objectives, namely **freedom and pluralism of the media** and the citizens' right to information, including a diverse overall media offering. To the contrary, it represents restrictions to the freedom of expression, freedom to provide services and the free movement of goods, as

applicable, of user interface service providers and product manufacturers which is not justified. This is even more problematic because no definition is given as to what functionalities should be open to adaptation by the user – we strongly assume, that e.g. age verification systems or payment options are not considered to be in scope.

With regard to Article 19(2) the **principle of proportionality is not met** because the provision does not take into account (i) whether the device/user interface is **technically apt to offer such functionality**, and (ii) whether the **implementation of this functionality would be disproportional** to the economic and operational capabilities of the provider. Furthermore, (iii) while it provides for an **appropriate timespan for implementation on the side of providers (Article 28(2) 2nd sentence)**, taking into account the necessary delays in developing, producing or having produced, and bringing to the market of related equipment/software, it apparently does not reconcile this with the proposed right of users which is to become effective 6 months after the entry-into-force of the future regulation.

An important issue related to user customization of user interfaces/devices is the enormous amount of individual “profiles” (settings) that would have to be stored and conveyed (back and forth) over networks, requesting significant additional resources (storing capacity, energy), which raises the question of consistency with the Green (Digital) Deal ambitions.

We recommend that the right to customisation of the media offer in Article 19 be removed from the Regulation, in order to ensure the legislation is targeted to its stated objectives, and that disproportionate measures be avoided.

Relationship with prominence rules for offers of general interest

It should further be noted that the revised Audiovisual Media Services Directive (Article 7a)¹ introduced a possibility for Member States to take measures – at their own discretion – to ensure the appropriate prominence of audiovisual media services of general interest. The proposed provision of Article 19 poses a problem of **consistency with existing EU law**, namely it leads to an **unclear relationship between public value services’ regulation and the users’ right to customisation**. Where, at Member State level, no clear-cut decision of the relationship (e.g. in case of conflict, prevalence of user customisation) has been taken, there is no upfront legal certainty for equipment manufacturers/providers of user interfaces; this brings about the risk of (again) amending the user interface should a media authority in an individual case decide otherwise on this point than the appraisal made by the manufacturer/provider.

Co-legislators should decide on clearer guard-rails for designation of ‘services of general interest’ to be laid down in legislation

Prominence of ‘audiovisual media services of general interest’ is referenced in the present proposal also at another point, namely Article 15 (2)(a). The Commission guidelines foreseen in this clause however are not sufficient because, contrary to other instances in the AVMSD, such as Video-Sharing Platforms’ designation or European works, the fundamental criteria and procedures for

¹ Directive (EU) 2018/1808

attributing the status of “service of general interest” have not been laid out in Article 7a AVMSD. This leads to divergent national transposition and implementation measures – if Member States at all decide to act in this field.

By way of example, the [German media authorities](#) recently published a “Public Value List” and a related listing (“ranking”) for **hundreds** of broadcasting services, consisting of TV and radio channels, and on-demand services that will receive **prioritised placement on smart TVs and user interfaces** for easy discovery. The “Public Value” designations include **public service and commercial broadcasters**, their and other providers’ catch-up services and apps, local and regional offerings as well as BBC World News (as the only non-domestic TV service). In Germany, media regulatory authorities have laid down a principle of “no-overriding” a user’s preferential settings through updates which leads to the issue that new services and content cannot be brought to the attention of users. This is aggravated by the overloaded lists of TV channels, catch-up services and apps that have been assigned public-value status and hence have to be featured prominently, putting at risk pluralism, diversity and innovation.

State-owned / Controlled enterprises and advertising (Article 24)

The proposed Regulation introduces a number of rules related to advertising, specifically for state-owned or state-controlled enterprises, with the aim of limiting the possibility for state-owned or state-controlled enterprises being used to further political goals. Such advertising could be to the detriment of other political or societal organisations who do not have access to the same (quasi-) public financial means, and bring about the risks of generally rendering media services dependent on such financing as well as of interfering in journalistic and economic competition among media services.

ETNO shares the objective of securing editorial independence of media service providers also through preventing undue influence from the State exercised through (arbitrarily) providing funds or other means of financing such as purchasing advertising space.

However, undertakings following economic purposes and having the State/authorities among its shareholders (e.g. minority shares, no specific voting rights or other forms of dominating influence) are dependent, as any other market participant, on the media to convey promotional messages. Such messages will, in the majority of cases, have as their objective to inform consumers about products and services of these enterprises. In some cases, such messages could not (even) focus on particular products/services but inform on general issues, such as in the field of diversity, respect for human dignity, ecological & social governance (ESG) at large.

For the definition of ‘State advertising’ in Article 2 (15), reference is made inter alia to ‘state-owned enterprises or other state-controlled entities’. However, no further definition of these undertakings is provided, and the notion thereof is not clear. Therefore, further definition on the matter is needed, in particular to precisely target the intended obligations to the objectives pursued by the present proposal for a EU Regulation.

It must hence be ensured that the aforementioned “usual” advertorial activities are not covered per se by Article 24(2). This provision aims at excluding that advertising spend is used to further political goals, i.e. to foster or expand the political power, by using public financial means that

political actors which are not part of the ruling government do not (currently) dispose of. The German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) has clarified such concept of undue levels of political influence in its 2014 judgement on the Inter-State Treaty on *Zweites Deutsches Fernsehen* (the second and nation-wide public service TV broadcaster). The Court delineated the “State sphere” (which may principally be represented in the governing bodies of public service media, but the number of which must not exceed a threshold of one-third of the members of its bodies and/or committees) from the larger societal sphere (BVerfG, judgement of 25 March 2014, cases 1 BvF 1/11 and 1 BvF 4/11, paras 41 et seq., 57 et seq. [59]). In this respect, the *Bundesverfassungsgericht* characterised such persons attributable to the **State sphere** by *inter alia* referring to their **exercise of state-political decision-making powers** and their **specific perspective of competing for office and mandate**. Transposed to the draft EMFA’s provision at hand, if such criteria are not present in view of the undertakings’ advertising activities, those should not be covered by Art. 24(2) EMFA.

* * *

In addition to these points, we wish to raise a number of issues which would benefit from further clarification:

Rights of recipients of media services (Article 3)

The provision introducing the rights of recipients of media services (plurality of news and current affairs content, produced with respect for editorial freedom of media service providers, to the benefit of the public discourse) introduced in Article 3 would benefit from further clarifications.

- Does Article 3 proclaim an individual, subjective right, or is it about an objective right from which no individual legal position can be deferred which could be enforced through legal procedures (via national courts)?
- Against whom can the defined right be executed? (e.g. a Member State’s positive obligation to establish a legal framework which enables and ensures the production of such plurality? A Member State’s obligation to designate specific service providers to deliver such variety through their output? In view of each single provider individually, or regarding all relevant providers in their entirety?)
- What about recipients’ access to such news/content – presumably, the right is directed at sources which are “openly” accessible to the general public?
- Would the right not exist in case news/content items were produced in disrespect of editorial freedom?
- Does a media service provider have to have the intention of furthering “public discourse” when producing such news/content?

Safeguards for public service media (Article 5)

Safeguards for Public Service Media (PSM) providers are essential and needed because **if the independence is not safeguarded, their role and remit** as described, *inter alia*, in the Amsterdam

Protocol², **cannot be fulfilled**. In this case, the requirements stemming from the individual State Aid decisions and/or the Commission Communication on Public Service Broadcasting will also not be met.

Article 5(1) mentions ‘impartial manner’, however this notion is not clear. Does impartial include “objective”? Is “neutral” regarded the same as “impartial”? Would Article 5(1) require that “opinions” (provided they are easily recognisable and duly marked as such, and kept quite distinct from factual information) also have to fulfil the “impartial” criterion?

There is also a **need to secure independence, expertise, accountability and transparent election of supervisory bodies’ members, and criteria for these issues have to be pre-established by law** etc. Otherwise, not only appointment and/or dismissal decisions regarding the PSM *management* may be unduly affected by certain interests, but the PSM governing bodies/persons execution of their tasks could also be at risk. EU State aid law requires that both the **fulfilment of the remit content-wise and the adherence to the financial management obligations (spending) have to be subject of effective control**.

Furthermore, with regards to Article 5(4), this regulation must establish clear criteria in accordance with which Member States’ law must regulate the main aspects of such authorities/boards.

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For questions and clarifications regarding this position paper, please contact Ross Creelman (creelman@etno.eu).

² Protocol on the system of public broadcasting in the Member States, to the Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts: [EUR-Lex - 11997D/PRO/09 - EN - EUR-Lex \(europa.eu\)](#)

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European Telecommunications
Network Operators' Association

info@etno.eu

+32 (0)2 219 3242

WWW.ETNO.EU

@ETNOAssociation

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